No. 08-321

SUPREME COURT, U.S.
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In The Supreme Court of the United States

EDWARD E. DUNLEAVY, *et al.*,

Petitioners,

v.

FAR AWAY FARM, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondent Far Away Farm, LLC, makes the following disclosures:

1. Far Away Farm, LLC is a privately owned limited liability company and it has no parent corporations.

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I. INTRODUCTION

In this case, the West Virginia Supreme Court of Appeals[1] ordered the Jefferson County, West Virginia Planning Commission to issue a conditional use permit for the Far Away Farm residential subdivision because Far Away Farm met the substantive standards of the Jefferson County Zoning Ordinance.

The Jefferson County Board of Zoning Appeals had previously applied the wrong version of the zoning ordinance to Far Away Farm, held hearings under the wrong version of the Ordinance, and then denied the CUP. The West Virginia Supreme Court Ordered the County to apply the correct version of the ordinance and then Ordered the correct governmental agency, the Planning Commission, to issue the permit – which is the procedural requirement when the correct version of the Ordinance was applied.

The Petitioners[2] have failed to understand that the case before the West Virginia Supreme Court arose from a Petition for Writ of Certiorari, and that the West Virginia Supreme Court had before it the entire record, and could make its decision based on the record and the evidence below.

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[1] In a typical Jefferson County West Virginia land use case, under the Jefferson County Zoning Ordinance, appeals proceed from the Planning Commission to the Board of Zoning Appeals ("BZA" herein) to the trial court level ("Circuit Court" herein) to the West Virginia Supreme Court of Appeals. (called the "West Virginia Supreme Court" herein for purposes of judicial economy.) The West Virginia Court system has no intermediate level appellate court.

[2] The Petitioners are referred to as "Dunleavy" herein.

Dunleavy also fails to understand that the one critical administrative determination as to whether Far Away Farm is entitled to a CUP – the LESA score[3] - was made prior to the BZA holding the hearings that Dunleavey now complains denied him due process. And Dunleavy failed to appeal the LESA score to the West Virginia Supreme Court. So even if the way the hearings were conducted denied him due process, it is a moot issue, because Far Away Farm had already obtained a successful LESA score, and Dunleavy did not appeal that score to the West Virginia Supreme Court.

That is the substance of this case – which amounts to no substance at all. There is no matter of Federal import here, and for this reason, and the other reasons contained herein, the Court should deny the Petition for Writ of Certiorari.

II. STATEMENT OF FACTS

1. Far Away Farm filed an application for Conditional Use Permit[4] on June 24, 2004 pursuant

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[3] The LESA score is an administrative assessment as to whether Far Away Farm merited the permit, which the West Virginia Supreme Court found was the only "substantive criterion" in the Ordinance, and which Far Away Farm successfully passed. The process is more fully explained below.

[4] A conditional use permit (CUP) is a permit to use land in a way that is permitted under the zoning ordinance if certain conditions are met. Conditional uses are defined as "a use of land or activity permitted only after fulfillment of all local regulations." *Ordinance* at page 6. For example, in this case, the property in which Far Away Farm is located is zoned as a rural district, but residential subdivisions are permitted if certain conditions are met. The Court in *Corliss* recognized that the "ordinance provides a mechanism whereby a 'conditional use permit' application may be filed to seek the Commission's

to Article 6 of the Development Review System of the Jefferson County,[5] West Virginia Zoning and Land Development Ordinance.[6]

2. The Far Away Farm property is located in an area of Jefferson County, West Virginia that is zoned as a rural district in the Jefferson County Zoning Ordinance.

3. A Rural District, like the district in which Far Away Farm is located, has at least nineteen (19) permitted uses, including low-density single-family residential development and farming.[7] The Ordinance provides that a piece of property in a Rural District, (where a residential subdivision is not a permitted use) may nonetheless be lawfully used for a residential subdivision if the developer makes application to the Zoning Administrator, meets certain conditions, and obtains a conditional

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permission for an already approved use of the land." *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93, 95 (2003).

> "A special exception or conditional use, unlike a variance, does not involve the varying of an ordinance, but rather compliance with it. When it is granted, a special exception or conditional use permits certain uses which the ordinance authorizes under stated conditions."

Harding v. Board of Zoning Appeals, 219 S.E.2d 324 (1975)

[5] Jefferson County is located in the Eastern Panhandle of West Virginia, roughly about seventy five miles from Washington, D.C.

[6] The Jefferson County Zoning Ordinance is called the "Ordinance" herein.

[7] Ordinance § 5.7(a)

use permit[8] from the Jefferson County Planning Commission[9] through the use of the Development Review System[10]

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[8] The rural district is addressed in Section 5.7 of the Ordinance.

[9] The Jefferson County Planning Commission is called the "Planning Commission" herein.

[10] The Development Review System (DRS) contains a Land Evaluation and Site Assessment component (hereinafter "LESA"), which is a numerical rating system, performed by the Zoning Administrator, comprised of specific criteria detailed in Ordinance Section 6.3 (The Soils Assessment), and Section 6.4 (Amenities Assessment). As part of this system, the developer is required to submit support data to the Zoning Administrator, which is information in 23 categories about the property to be developed and the surrounding area.

Both the soils assessment and the amenities assessment are given a point score based on a numerical system.

The amenities assessment portion of the Development Review System comprises 75% of the overall point score. The amenities assessment portion of the Development Review System is an evaluation of various criteria. The criteria considered under the amenities assessment include the site size, the nature of adjacent development, the distances to the growth corridor and to the public schools, the compatibility with the Comprehensive Plan, the availability of public water and sewer, adequacy of roads, and the availability of emergency services.

The Zoning Administrator assigns a point score to each of the criterion. The evaluation is given a numerical score based on the importance of a parcel's agricultural significance or its development potential. A higher score on a particular criterion indicates that the property is better suited for agriculture, and a lower score indicates that the property is more suitable for development. At the time of the events in this case, a project seeking a CUP was required to score 55 points or less in order to proceed to the next stage of development approval.

4. The Jefferson County Zoning Ordinance requires steps in a process to obtain a Conditional Use Permit. To obtain a CUP, the proposed residential subdivision must follow the procedures outlined in § 7.3 of the Ordinance, which provides an overview of the development review system as set forth below:

> Section 7.3 General Development Review System Requirements
>
> (a) If a developer's proposal is not listed as a principal permitted use in a zoning district, he must submit a Development Review System application for his project subject to the requirements of Section 7.4.
>
> (b) Filing an application with the Planning and Zoning Staff is the first of several stages within the Development Review System. Those stages are listed below.
>
> (1) Filing the application
>
> (2) Planning and Zoning Staff Evaluation of the Development Review System
>
> (3) Compatibility Assessment Meeting
>
> (4) Public hearings

Far Away Farm had a successful score of 50.2 and therefore passed the development review.

(5) Planning and Zoning Commission's Decision on the issuance or denial of the Conditional Use Permit

(6) Board of Appeal's Decision on any Appeal processed.

5. As a result of Far Away Farm's CUP application, a LESA score evaluation was undertaken by the zoning administrator, Paul Raco. Although Raco gave the development a passing LESA score of 46.2, Edward E. Dunleavy and Edward R. Moore appealed Raco's LESA score to the BZA on October 29, 2004.

6. The BZA, upon hearing the Moore/Dunleavy appeal, slightly modified Raco's decision from 46.2 to 50.2 but determined that Far Away Farm, nonetheless, met the required LESA score of less than 55 points, thus allowing Far Away Farm to advance to the Compatibility Assessment Meeting provided in Section 7.6 of the Ordinance.[11]

7. Section 7.6 of the Jefferson County Zoning Ordinance requires that the planning commission staff hold a compatibility assessment meeting to allow the adjacent property owners and

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[11] Dunleavy and Moore subsequently appealed the BZA's LESA score evaluation to the Circuit Court. The Circuit Court consolidated its decision in the Dunleavy appeal (challenging the BZA's upholding Far Away Farm's successful LESA score) with its decision as to Far Away Farm's appeal (of the BZA's subsequent decision to deny Far Away Farm's CUP) in its September 18, 2006 Order. Dunleavy did not appeal the LESA score to the West Virginia Supreme Court.

others to hear about the development and make their concerns known.

8. A Compatibility Assessment Meeting was held for Far Away Farm in April 13, 2005 that lasted approximately seven hours. Members of the public, including Dunleavy, raised one hundred six (106) "compatibility issues."

9. As a result of the Compatibility Assessment Meeting, the Planning Commission staff prepared a Staff Report that listed the compatibility issues. There were thirty-nine issues with which the developer agreed to take certain actions and were therefore considered "resolved" issues.

10. There were sixty-seven (67) issues with which the developer did not agree, because those requests were unreasonable,[12] and were therefore considered "unresolved" issues. Had the developer agreed to these requests it would have likely destroyed the economic viability of the project.

11. In order to address the sixty-seven (67) unresolved issues, Far Away Farm filed with the BZA a thirty (30) page memorandum addressing each issue and documents in support of its position totaling approximately three hundred twenty (320)

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[12] For example, some of the sixty-seven requests were that the developer eliminate approximately 50 of the proposed total of 152 lots; set aside a $500,000.00 bond to provide water services to cover possible future well failures; confine the development to the southern 36 acres of the property and donate the balance of the property to the Civil War preservation Trust; and compensate the community in the amount of $400,000.00 per year for the ecological loss of trees from the creation of impervious services.

pages, including expert witness opinions and reports which included:

a. *Traffic Study* which concluded that the Far Away Farm traffic would not create a significant amount of peak traffic impact on any of the four (4) studied intersections.

b. *The Preliminary Ground Water Supply Assessment* (Hydrology Report) which concluded that "it is unlikely that a community well" such as the well proposed by Far Away Farm "will interfere with wells on surrounding properties."

c. *The Preliminary Geological Site Assessment* stated that there were no sink holes on the site and there did not appear to be any adverse impact of the proposed development on the surrounding properties.

d. *An Architectural Assessment* of the Far Away Farm property provided by the Ottery Group, which concluded that "to date, no significant data has been recovered to support an argument that this property is historically significant.

e. *Phase I Environmental Report*, revealing evidence of minor recognized environmental conditions in connection with the subject property that did not preclude development.

f. *Archeological Report.* It was concluded that "archival research identified that 3

> prehistoric sites and 1 National Register historic property were located with 1.5 miles of Far Away Farm; however, no previously recorded sites or properties were identified within the boundaries of this parcel." The results of the pedestrian reconnaissance concluded that no artifacts attributable to the Battle of Shepherdstown were identified.

12. The matter was scheduled for a public hearing before the BZA in July of 2005 for the BZA to hear the Staff Report on the sixty-seven unresolved issues and address the concerns raised at the Compatibility Assessment Meeting, pursuant to 7.6(e) of the Ordinance.

13. Edward Dunleavy testified at the July 26, 2005 Public hearing regarding various issues including his opinion regarding the meaning of the Ordinance definition of "neighborhood" and other matters that are at this point irrelevant.

14. Nonetheless, Dunleavy was present and testified in this public hearing, as he has been present in most if not all major administrative and judicial hearings involving Far Away Farm.

15. On August 9, 2005, the BZA called a special meeting for the purpose of considering the action they would take on the conditional use application for Far Away Farm. The meeting commenced at approximately 9:17 a.m. and concluded at 10:18 a.m.

16. The BZA then voted to deny Far Away Farm its Conditional Use Permit.[13]

17. The BZA's Findings of Fact, which, under the Ordinance, should have dealt with the sixty-seven unresolved issues, consisted of a total of six double-spaced transcript pages. Contrary to the Ordinance, the sixty-seven unresolved issues were not addressed by the BZA.

18. As a result of the August 9, 2005 BZA Special Meeting, the BZA issued an Order on September 15, 2005, denying Far Away Farm its Conditional Use Permit, even though Far Away Farm met all administrative requirements for the issuance of the CUP.[14]

19. The BZA admitted that its decision was based on defining neighborhood "within a one mile radius of the southeast corner of Far Away Farm."[15] This definition of neighborhood is identical to the one submitted by Dunleavy at the July hearing,[16] and the BZA adopted Dunleavy's density calculations as well. The BZA relied heavily on Dunleavy's exhibit showing the one mile circle surrounding the Far Away Farm property.

20. The basis for the rejection of the CUP, and the issue of the development's purported lack of Compatibility with the surrounding neighborhood is irrelevant to this appeal because among other

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13 BZA Deliberation Tr. (August 9, 2005), 14:10-11

14 *See* Board's Order Denying Conditional Use Permit Application, dated 9/15/05.

15 BZA Deliberation Tr. (August 9, 2005), 15:2-3

16 BZA Deliberation Tr. (August 9, 2005), 173:20-21

reasons, the West Virginia Supreme Court has since found that the Ordinance provision purporting to apply the density standard are inapplicable to Far Away Farm.

21. However, the fact that Dunleavy attended the administrative hearings regarding this matter and the BZA adopted Dunleavy's definition of "neighborhood" shows that he was deeply involved in the consideration of the CUP by the BZA, and bears directly on his claim of lack of due process, since he had more than adequate notice and opportunity to be heard at all stages of the proceedings in this case.

22. Because the CUP was denied, Far Away Farm filed a Petition for Writ of Certiorari to the Circuit Court on October 12, 2005.

23. The Circuit Court consolidated Dunleavy's prior Petition for Writ of Certiorari (where he challenged the LESA scores before the Circuit Court) with Far Away Farm's Petition.

24. The Circuit Court issued an Order upholding the BZA's decision to deny the CUP on September 18, 2006 and mostly denying Dunleavy's challenge to the Far Away Farm LESA score and upholding the LESA score.[17]

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[17] One issue that has been touted by opponents of the subdivision is their claimed belief that the subdivision is on the site of a battlefield. While the opponents of Far Away Farm have made numerous unsubstantiated allegations that the development is located in a Civil War battlefield, there is no proof of this claim; in fact, the evidence is that the Battle of Shepherdstown occurred near the river, which is about one mile away. Undoubtedly, soldiers have walked on the Far Away Farm property, but the same is true for practically every square foot of Berkeley, Jefferson and Morgan Counties in the

25. On September 12, 2007, Far Away Farm filed a Petition for appeal to the West Virginia Supreme Court of Appeals based on the BZA's denial of the CUP. Dunleavy did not file any cross assignment of error or otherwise appeal the Circuit Court's decision.

26. The case was subsequently argued and an Order was entered on April 17, 2008. The West Virginia Supreme Court determined that the BZA had applied the wrong version of the Ordinance to Far Away Farm. The Ordinance had been amended on April 8, 2005 to provide that the BZA issue the CUP, instead of the planning commission as was required under the former ordinance. However, the West Virginia Supreme Court held that the prior Ordinance applies to Far Away Farm since Far Away Farm's CUP process began before the Ordinance was amended. The Court then ordered that the Jefferson County Planning Commission

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Eastern panhandle of West Virginia. If that were the standard for historic property, no development could ever occur in the Eastern Panhandle.

Most important is the legal issue concerning the property as "historic." Far Away Farm was exempt from the Ordinance definition as a historic site. As the Circuit Court correctly ruled, (*Order* at 23-25) the Far Away Farm site is not designated as a "Historic Site" within the meaning of the Ordinance, section 2.2, which requires that a given property must be listed on the "West Virginia or the National Register of Historic Places" if it is to be considered as a historic site. Far Away Farm has never been registered on a "Register of Historic Places" and cannot be, because the law states that the owner must consent and Far Away Farm does not consent. (*See* Historic Preservation Act, 16 U.S.C. § 470, Sec. 101, a, (a)(6))

issue the CUP to Far Away Farm. The Planning Commission is the correct agency to issue the CUP under the former Ordinance.[18]

27. Petitioners filed a Petition for Re-hearing that was denied 5-0 on May 16, 2008.

III. ARGUMENT

A. The Matter Below Arose To The West Virginia Supreme Court As A Result Of A Writ Of Certiorari, Consequently All Facts And Activities In The Case Were Fully Reviewable Under West Virginia State Law

The Dunleavy theory fails to consider that this matter was brought before the Circuit Court of Jefferson County pursuant to a writ of certiorari. Under the concept of certiorari, the Circuit Court (and ultimately the West Virginia Supreme Court) can review the factually relevant record of the proceeding below.[19] The West Virginia Supreme Court merely exercised its constitutional authority[20]

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[18] Further, the Jefferson County Circuit Court has held that the April 8, 2005 amendments to the Ordinance were invalid due to procedural irregularities. Although irrelevant to this proceeding, the Ordinance has just been amended again as of October 2, 2008. All Ordinance references are to the former Ordinance (pre-April 8, 2005) unless otherwise noted.

[19] W. Va. Code, § 8A-9-5 states in relevant part:

> (a) Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.

[20] The Constitution of West Virginia, Art. 8, § 3:

to review a decision of the Circuit Court, which in turn reviewed the entire body of facts that were before the Planning Commission and the Board of Zoning Appeals. For Dunleavy to now say that those facts were not reviewable is simply wrong.

The West Virginia Supreme Court carefully reviewed the Ordinance, the Record, and the facts in the case – and concluded that Far Away Farm merited the CUP:

> ... Having carefully reviewed the former Ordinance ... As discussed above, FAF received a successful LESA score, and the compatibility assessment meeting was conducted.
>
> ***
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> ... In sum, FAF addressed all the unresolved issues at the public hearing and its evidence was unrefuted. Accordingly, based upon all the above, we find that FAF complied with every requirement of the former Ordinance and therefore, is entitled to the permit.
>
> ***
>
> ... Furthermore, the evidence in the record shows that FAF satisfied all the requirements necessary to obtain the permit.

Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals, ___ W. Va. ___, 664 S.E.2d 137, _____ (W. Va. 2008) (portions omitted)[21]

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[21] Contrary to Dunleavy's assertions on page 4 of their Memorandum, the West Virginia Supreme Court found that

The time honored test under West Virginia law, often cited, is:

> While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.

Corliss v. Jefferson County Bd. of Zoning Appeals, 214 W. Va. 535, 591 S.E.2d 93 (2003).

The concept that both the Circuit and Supreme Courts[22] may review the facts below is both explicit and implied in the *Corliss* test. If the West Virginia Supreme Court could not review the facts, then how could the Court determine how to rule, or whether the law was applied incorrectly (as happened in this case) or whether the BZA was plainly wrong "in its factual findings" or acted beyond its jurisdiction (as happened in this case)?

Further, the last part of the *Corliss* test – to determine whether the BZA "acted beyond its jurisdiction" – is exactly what the West Virginia

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Far Away Farm submitted "substantial evidence" to the BZA to support its subdivision, but that the development's opponents submitted only "anecdotal evidence" regarding traffic and, with regard to the other unresolved issues, "no evidence was presented refuting or contradicting that presented by Far Away Farm." *Far Away Farm, LLC*, 664 S.E.2d 137, 145 (2008).

[22] On appeal in an administrative case, the West Virginia Supreme Court uses the same standard of review as the Circuit Court. *Webb v. West Virginia Board of Medicine*, 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002).

Supreme Court did in *Far Away Farm*. The BZA "acted beyond its jurisdiction" in applying the wrong law to Far Away Farm. The West Virginia Supreme Court recognized the error, and corrected it. Curiously, this seems to be what Dunlevy are saying that the Court can no longer do – or at least, that the West Virginia Supreme Court is no longer able to make a decision on any facts that were raised below, if the Court determines that the BZA acted without jurisdiction.

As a result, Dunlevy/Moore's petition should not be granted because the primary basis for the Petition flies directly in the face of the jurisdictional prong of the *Corliss* test - unless this Court chooses to reverse and undo the state legal standard that the West Virginia Supreme Court has applied for over 30 years.[23]

The West Virginia statute also provides that the Supreme Court may review the matters that were raised to the Circuit Court[24] below on Certiorari:

> An appeal may be taken to the West Virginia Supreme Court of Appeals from the final judgment of the court or judge reversing, affirming or modifying the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals within the same time, in the

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[23] The test has been applied at least since the decision in *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (W.Va. 1975).

[24] *See Maplewood Estates Homeowners Ass'n v. Putnam County Planning Com'n*, 218 W. Va. 719, 722-723, 629 S.E.2d 778, 781 - 782 (W. Va. 2006)

> same manner, and upon the same terms, conditions and limitations as appeals in other civil cases.

W. Va. Code § 8A-9-7.

It is the law of West Virginia that a statute, ordinance, or law should be interpreted[25] to make sense, and in a way that furthers the purpose of the statute.[26]

The certiorari provisions of W.Va. Code Chapter 8A are designed to allow a petition for certiorari to wind its way through the Circuit Court and then to the West Virginia Supreme Court for appellate review. The Dunleavy analysis (which, in this case amounts to advocating that the West Virginia Supreme Court should disregard the *Corliss* test and that the Court cannot review issues of fact and jurisdiction below), would wholly thwart this overriding purpose and stop the statute from operating as it was intended.[27] This cannot be the proper interpretation of this section, under the statutory construction rules.

The rule against absurdity states that ". . . a well established cannon of statutory construction counsels against . . . an irrational result [for] [i]t is

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[25] *Jackson v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 1488566 (W. Va. 2004).

[26] *State ex rel. McGraw v. Combs Services*, 206 W. Va. 512, 518, 526 S.E.2d 34, 40 (W. Va. 1999).

[27] Further, the West Virginia Supreme Court was free to apply a de novo standard of review as to the Circuit Court's decision regarding the legal issues in this case. *Lower Donnally Ass'n v. Charleston Mun. Planning Com'n*, 212 W. Va. 623, 626, 575 S.E.2d 233, 236 (W. Va. 2002)

the duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 401, 582 S.E.2d 841, 848 (W. Va. 2003) (Davis, J., dissenting opinion).

The Dunleavy apparent interpretation of this statute, i.e., eliminating the West Virginia Supreme Court's review of the case below because of the BZA's lack of jurisdiction, would lead to "absurd, inconsistent, unjust or unreasonable results" *Id.* that cannot be what the statute envisions.

Under the Dunleavy theory, the Court would be wholly without jurisdiction to review the actions of an inferior body regarding the inferior body's lack of jurisdiction - a curious proposition which would lead to a circular inability for the Court to right jurisdictional wrongs that occurred below. While it is generally a true statement of the law that the actions of an inferior body or court that are taken absent jurisdiction are void, it cannot be true that the West Virginia Supreme Court has no power to review those actions (or the facts upon which the actions are based), or our appellate system would disintegrate.

The West Virginia Supreme Court in *Far Away Farm* held that the BZA could not "decide whether to issue or deny the permit." It did not hold that every fact adduced in every hearing was void.[28] The Dunleavy argument fails to recognize that the facts and testimony that were presented at the

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[28] *Far Away Farm v. Jefferson County Board of Zoning Appeals*, 664 S.E.2d 137, 144 (W. Va. 2008).

hearing before the BZA, (and later reexamined by the Circuit Court), would remain unchanged even if (as Dunleavy suggests) the Court were to order a full rehearing of the matter below.

The West Virginia Supreme Court is not precluded from a review of the facts below just because those facts were ultimately used by the BZA to act outside its jurisdiction. The decision made by the BZA outside of its jurisdictional boundaries is void, but the facts developed in making the decision are not void – therein lies the distinction, and the reason that this Court can decide to issue the CUP.

Dunleavy's attempt to hoist Far Away Farm on its own jurisdictional petard fails due to their lack of understanding of this principle.[29]

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[29] Contrary to Dunleavy's unpleasant inferences, Far Away Farm has never claimed that it did not know about the amendments themselves. Far Away Farm only states that it did not know about the County Commission's promise in its Commission meeting minutes that it would "grandfather" CUP applications submitted before the April 8, 2005 Ordinance amendments were adopted. That item was only discovered by counsel for Far Away Farm in a review of the Commission minutes for another case, and then, when discovered, the jurisdictional question was raised before the West Virginia Supreme Court in this case in the opening brief – the first opportunity to raise the issue in the West Virginia Supreme Court after the matter was discovered. It is also worthwhile to note that Attorney Peter Chakmakian, who purportedly attended one or more of the County Commission meetings where the Amended Ordinance was discussed, did not become counsel in Far Away Farm's case until the West Virginia Supreme Court appeal process had begun. Consequently, even if Mr. Chakmakian had heard statements made by the Commission regarding the application of the former Ordinance, that knowledge can hardly be imputed to Far Away Farm

While it is true that the West Virginia Supreme Court does not have original jurisdiction[30] over the issuance of CUPs, it certainly has statutory jurisdiction to conduct a review of the decisions of the BZA and Circuit Court, and authority to correct errors.

Not only does the statute explicitly permit examination of the record on a Writ of Certiorari, case law also permits the West Virginia Supreme Court to review factual findings and the record on a Writ of Certiorari. The Court has succinctly stated:

> At common law, a writ of certiorari served the purpose of "bring[ing] before the court for inspection the record of the proceedings of an inferior tribunal in order that the superior court may determine from the face of the record whether the inferior court has exceeded it jurisdiction or has not proceeded according to the essential requirements of the law." 14 Am. Jur. 2d Certiorari § 2 (2000). The Legislature is possessed of the power to alter the common law. Syllabus, *Perry v. Twentieth St. Bank*, 157 W. Va. 963, 206 S.E.2d 421 (1974) ("By virtue of the authority of Article 8, Section 21 of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the legislature to enact statutes which abrogate the common law."). The Legislature also is empowered to expand the jurisdiction

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nearly two years prior to Mr. Chakmakian's appearance as counsel.

30 W.Va. Const. art. VIII, § 3.

> of this and all other courts of record. W. Va. Const. art. VIII, §§ 3 and 6 (both referencing such other jurisdiction "as may be prescribed by law"). Indeed, the decision by the Legislature to make certiorari available for persons challenging decisions by the board of zoning appeals as well as to those Persons challenging the decisions of planning commissions demonstrates that the Legislature sought to assert these powers in order to afford a remedy for the review of the record developed by these bodies as a convenient means of assuring adherence to the requirements of the law without necessarily providing a means of attacking their proper exercise of discretion. *See City of Huntington v. State Water Comm'n*, 135 W. Va. 568, 576, 64 S.E.2d 225, 230 (1951) ("the writ of certiorari is available in order to obtain judicial review of findings of an administrative board" acting in a judicial or quasi-judicial capacity); Syl. Pt. 1, *Quesenberry v. State Road Comm'n*, 103 W. Va. 714, 138 S.E. 362 (1927) (certiorari lies "to review judicial or quasi judicial actions of an inferior board or tribunal").

Lower Donnally Ass'n v. Charleston Mun. Planning Com'n, 212 W. Va. 623, 575 S.E.2d 233 (W. Va. 2002)(portions and citations omitted).

As a result, the West Virginia Supreme Court may review both the facts and the law below, and the actions of the Planning Commission, the BZA, and the Circuit Court for error, and may further examine the adherence of the inferior tribunals to

the *Corliss* test, which includes examination of the BZA's jurisdiction, and an Order that corrects the jurisdictional error.

That is exactly what the Court below did. It was fully within the bounds of the law, and this Court could as a result deny the Petition for Writ of Certiorari on that basis alone.

It is also worth noting that Dunleavy fully participated in the proceedings at the administrative level, at the Circuit Court level, and at the West Virginia Supreme Court of Appeals. This Participation included, at least:

10/29/04	Dunleavy's Appeal of LESA scores to BZA
1/20/2005	BZA Meeting RE: LESA Appeal (Dunleavy attended)
3/18/2005	Dunleavy filed a Petition for Writ of Certiorari to the Jefferson County Circuit Court regarding LESA scores
4/13/2005	BZA Neighborhood Compatibility Meeting (Dunleavy attended)
7/26/2005	BZA Public Hearing (Dunleavy attended)
Various	Dunleavy attended a variety of other judicial proceedings, including the West Virginia Supreme Court argument

It is now rather disingenuous for Dunleavy to maintain that he has been denied due process, when he in fact was the source of much of the "process" in

this case by filing challenges and a petition of Writ of Certiorari before the Circuit Court of Jefferson County, West Virginia.

B. The Local Zoning Ordinance Requires the Planning Commission To Issue Conditional Use Permits and the West Virginia Supreme Court Merely Ordered the Parties and the Jefferson County Government to Follow The Local Ordinance That Applied To Far Away Farm

The West Virginia Supreme Court considered and thoroughly reviewed the procedural requirements to obtain a CUP.[31] Immediately

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[31] In the case below, after determining that the April 8, 2005 amendments to the Ordinance do not apply to Far Away Farm, (or to any other CUP application prior to April 8, 2005), the West Virginia Supreme Court of Appeals explained the process by which the Ordinance was to apply to a CUP applicant:

First, the developer is required to submit a Conditional Use Permit application. Second, the Planning and Zoning Staff (hereinafter "Staff") was required to complete a Land Evaluation and Site Assessment (hereinafter "LESA"). Third, upon receiving a passing LESA score a Compatibility Assessment Meeting is to be held, allowing interested parties the opportunity to hear the developer's presentation and proposal. Fourth, following the Compatibility Assessment Meeting, the Staff prepares a report of the Meeting, including the developer's proposal, the agreed upon conditions, and other pertinent data. Fifth, the Staff holds a public hearing "to hear the staff's report of the issues and concerns raised at the Compatibility Meeting." Finally, the Supreme Court of Appeals noted that "Following the public hearing, Section 7.6(g) of the former Ordinance stated that the permit shall be issued, issued with conditions, or denied." See *Far Away Farm, LLC v.*

following this review of the Ordinance in *Far Away Farm*, the Supreme Court of Appeals stated:

> "Having carefully reviewed the former Ordinance, we agree with FAF that other than the LESA scoring requirements, there was no specific substantive criterion governing the decision to deny or issue the permit."[32]

The Court went on to analyze the facts and law in the case and concluded that Far Away Farm[33]

Jefferson County Bd. of Zoning Appeals, 664 S.E.2d 137, 144 (W. Va. 2008).

[32] *Id.*

[33] In the *Far Away Farm* case, the developer filed a CUP application on June 23, 2004, in compliance with the former Ordinance. On June 28, 2002, the Zoning Administrator conducted and evaluation and issued a passing LESA score, in compliance with the former Ordinance. The LESA score was appealed to the BZA by community members, at which time the BZA heard the appeal and modified the LESA score, which remained sufficient for the CUP to move on to the required Compatibility Assessment Meeting, which was held on May 24, 2006. During the Compatibility Assessment Meeting, one hundred and six (106) compatibility issues were raised, of which Far Away Farm agreed to satisfy thirty-nine (39) of the issues. Far Away Farm's agreement to satisfy a number of the issues raised at the Compatibility Assessment Meeting is not a requirement taken into consideration prior to the issuance of a CUP.

After issuance of its report regarding the Compatibility Assessment Meeting, in compliance with the Ordinance, the Staff held a public hearing on July 26, 2005 to discuss the sixty-seven (67) unresolved issues. Far Away Farm submitted a memorandum addressing each issue as well as additional supporting documentation.

On August 9, 2005, the BZA denied the FAF CUP based on the proposed development being "too dense to be compatible with

met the Ordinance's one "substantive criterion" – the LESA score - and fulfilled all of the ordinance requirements to obtain a CUP. ". . . Accordingly, based upon all the above, we find that FAF complied with every requirement of the former Ordnance and therefore, is entitled to the permit." *Far Away Farm v. Jefferson County Board of Zoning Appeals*, ____ W. Va. ___, 664 S.E.2d 137 (W. Va. 2008)

The importance of the fact that Far Away Farm successfully passed the LESA scoring system cannot be overemphasized. The LESA score takes at least 23 issues[34] into account before a development is even considered eligible to seek full approval for a conditional use permit – including information on issues such as traffic, extent of conversion of farm land to residential use, and the general effect of the development on the area's schools, roads, etc. If the project was incompatible with the area, and not fit for development, then it would not have passed LESA – it's that simple.

Equally important is the Supreme Court's ruling that the LESA score contains the only "substantive criterion" that the developer must meet to obtain the CUP. [35] Since Far Away Farm obtained

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the surrounding neighborhood" and that the "roads were inadequate to deal with the increased traffic that would result from the development." *See Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 664 S.E.2d 137, 141 (W. Va. 2008).

[34] Ordinance Section 7.4(d).

[35] The West Virginia Supreme Court of Appeals also noted that the ordinance calls for a compatibility assessment hearing. This is not a "substantive criterion" but the Court has previously held that purpose of the compatibility assessment

a passing LESA score, and the West Virginia Supreme Court has ruled that a passing LESA score is the only substantive criterion which Far Away Farm must meet to obtain a CUP, the only logical conclusion is that Far Away Farm is entitled to a CUP under the ordinance.

This is exactly the conclusion that the West Virginia Supreme Court reached. No amount of re-hearing will change that analysis, and no amount of re-hearing will change five basic facts in this case:

1. The fact that Far Away Farm had a passing LESA score is uncontroverted.

2. The fact that Far Away Farm's LESA score was obtained from the county zoning administrator at the outset of the CUP application process, well before the BZA became involved in the hearing process, and well before any alleged jurisdictional defect could have attached, even under the broadest reading of Dunleavy's Petition for Writ of Certiorari.

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hearing is to provide an informed public debate about the issues related to the development. *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (W. Va. 2003).

Because of the successful LESA score obtained by Far Away Farm, a Neighborhood Compatibility Assessment Meeting was held in April of 2005 that lasted approximately seven hours.

Under the *Corliss* analysis, the informed public debate occurred in this case. As a result, since the "informed public debate" has occurred in this case, and the purpose of the Compatibility Assessment Meeting has been met.

3. The fact that the West Virginia Supreme Court of Appeals held in this case that the only substantive criterion under the Ordinance is whether Far Away Farm obtained a passing LESA score.

4. The fact that Dunleavy did not challenge the West Virginia Supreme Court of Appeals' conclusion that the LESA score is the only substantive criterion upon which a CUP is issued.

5. The fact that, under the applicable Ordinance, the Planning Commission is the administrative body that issues the CUP.

Upon consideration of these basic facts, the West Virginia Supreme Court's decision to require the Planning Commission to issue the CUP is the only result that makes sense.

There is another critical point that Dunleavy fails to grasp - since the LESA score is obtained well before the BZA's hearing process, there is no question that the zoning administrator had jurisdiction to apply the LESA test and assess the LESA score, under either the former or amended Ordinance.

Even if Dunleavy's position is correct (i.e., that all matters that occurred before the BZA are void), the LESA score remains untainted because it was assessed before the matter went to the BZA for hearings on the CUP.

After the LESA score was assessed, Dunleavy then appealed the administrator's LESA score to the

BZA. The BZA modified and then upheld the LESA scores under the BZA's statutory function as a body that reviews planning commission and administrative decisions.

After the BZA upheld the LESA scores, Dunleavy's appeal to the Circuit Court of the LESA scores resulted in the Circuit Court upholding the LESA scores.

And then, Dunleavy failed to appeal the Circuit Court's decision to uphold the LESA scores to the West Virginia Supreme Court, when he could easily have filed an appeal or a cross petition for appeal. But he did not.

As a result, the LESA score assessment and appeal is clearly within the jurisdictional authority of the zoning administrator and BZA, and has not been overturned on appeal.

The West Virginia Supreme Court of Appeals' conclusion that the LESA score is the only substantive criterion for a CUP under the Ordinance, and Dunleavy's failure to appeal those scores to the West Virginia Supreme Court, is ultimately fatal to Dunleavy's appeal to this Court. The West Virginia Supreme Court apparently recognized this fact when it ordered the CUP to issue based on the successful LESA score.

Consequently, a re-hearing, or a dozen re-hearings, will be a waste of time and resources that could be better spent elsewhere.

Federal Courts recognize this concept regarding review of administrative agency decisions:

In reviewing an administrative agency decision that contained alleged inconsistent statements and positions by agency officials, this Court in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530, 168 L. Ed. 2d 467 (U.S. 2007) recognized a lower court decision (*PDK Laboratories Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799, 360 U.S.App.D.C. 344, 357 (C.A.D.C. 2004)) about the futility of further review of an agency decision that would make no difference in the ultimate outcome in the case. *PDK Laboratories* states:

> In administrative law, as in federal civil and criminal litigation, there is a harmless error rule: § 706 of the Administrative Procedure Act, 5 U.S.C. § 706, instructs reviewing courts to take "due account ... of the rule of prejudicial error." If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.[36]

PDK Laboratories Inc. v. U.S. D.E.A., 362 F.3d 786, 799, 360 U.S.App.D.C. 344, 357 (C.A.D.C. 2004)

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[36] Although the Court in *PDK* did remand the case for further consideration, the remand was based on the possibility of a different outcome in that case if the agency below had examined the evidence differently. Here, that result is impossible, since the WVSCA has ruled that the only substantive standard is the LESA score, and FAF has passed the LESA score. A remand to the agency below, in this case the BZA, would be the exact same "senseless" act of which the PDK court warned.

In West Virginia, ... "a zoning appeals board is simply 'an administrative agency, acting in a quasi-judicial capacity.'" *Far Away Farm v. Jefferson County Board of Zoning Appeals*, ___ W. Va. ____, 664 S.E.2d 137 (W. Va. 2008). While a review of the merits of an administrative agency decision is somewhat different from a finding that the agency lacked jurisdiction, the principle is the same – a remand to a lower body is pointless if it makes no ultimate difference in the decision or ultimate outcome of the case. This is exactly the point of the ruling of the WVSCA in this case, since Far Away Farm's successful LESA score and attendance at the Compatibility assessment meeting means that FAF qualifies for the CUP.[37]

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[37] *See also City of Portland, Oregon v. E.P.A.*, 507 F.3d 706 (C.A.D.C. 2007) ("even were EPA to redress its alleged errors, the final rule would remain unchanged, making this the epitome of harmless error"); *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 161 (C.A.2 (Conn.)), 2008 (speaking of sending the case back to the agency for review - "We do not do so because, for reasons already discussed, we conclude that the denial of certification is rationally supported by other findings of lost use satisfactorily grounded in record evidence."); *Chai v. Department of State*, 466 F.3d 125, 133, 373 U.S.App.D.C. 279, 287 (C.A.D.C. 2006) ("An error is harmless if it was not material to the outcome of the proceeding."); *Salt River Project Agricultural Improvement and Power Dist. v. United States*, 762 F.2d 1053, 1060–1061 n. 8 (D.C. Cir. 1985) ("When it is clear that based on the valid findings the agency would have reached the same ultimate result, we do not improperly invade the administrative province by affirming."); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 14 (D.C. Cir. 1985) ("Since the ALJ's ultimate finding ... is the only conclusion that could reasonably have been drawn from the record in this case considered as a whole, any error in the ALJ's analysis was harmless.").

Rule 10 of the Rules of the Supreme Court of the United States gives some general guidelines concerning the types of cases this Court reviews upon a Writ of Certiorari. Rule 10(c) states in relevant part that this Court will review a state Court decision if the state court has ". . . . decided an important Federal question in a way that conflicts with relevant decisions of this Court." *Id.*

This case does not meet Rule 10's paradigm. In this case, unlike Rule 10's example, the West Virginia Supreme Court of Appeals has decided the case below in a way that is very consistent with Federal decisions and does not conflict with the underlying Federal principle that pointless remands are a waste of time for everyone. The Court below has in effect decided that only one result could occur under its determination of the requirements of the applicable zoning ordinance, and ordered an outcome that is consistent with that decision.

The West Virginia Supreme Court's holding that the LESA score is the only substantive criterion for a CUP under the Ordinance is a correct reading of the Ordinance. Not only is it a correct reading of the Ordinance, Dunleavy failed to challenge the LESA score holding either here or before the West Virginia Supreme Court in its Petition for re-hearing. That holding is unquestionably the law in West Virginia, and, as a result, Far Away Farm is entitled to its CUP based on its successful LESA score - a LESA score successfully obtained at a point in time in the CUP process well before the matter went to the BZA, well before the alleged jurisdictional taint could have occurred, and at a

point in time in the CUP process that Dunleavy has not challenged in his petition.

No amount of re-hearing will change this fact.

The decision (of which the petitioners complain) to remand the case to the Planning Commission to issue the CUP is the only practical decision that the West Virginia Supreme Court of appeals could have made, especially in light of the fact that Far Away Farm clearly merits the CUP.

This Court should therefore deny the Petition for Writ of Certiorari.

C. The Planning Commission does not have to be a Party to the Case below to be under the Jurisdiction of the West Virginia Supreme Court

The Planning Commission is an agency of the Jefferson County Commission. *Potomac Edison Co. v. Jefferson County Planning and Zoning Com'n*, 204 W.Va. 319, 321, 512 S.E.2d 576, 578 (W.Va. 1998) ("The Planning Commission is a political subdivision of the Jefferson County Commission, and is empowered to enforce land use regulations regarding real property located in Jefferson County.")

The West Virginia Supreme Court has jurisdiction over the County Commission, so it has jurisdiction over the agencies, the BZA and Planning commission. This is doubly true because of the nature of the Circuit Court's review was by a Writ of Certiorari, which takes into account the entire record below, including those matters dealt with by the planning commission in the initial stages of the CUP process. The West Virginia Supreme Court has jurisdiction to review all matters that occurred in

the record below, including the authority by authorized by the County's Ordinance required the Planning Commission to issue the CUP. With the Court having found that the statute and Ordinance required a remand to the Planning Commission, it was not necessary for the Planning Commission to be a direct party in this case for the Court to remand the case to the Planning Commission for direct action.

The West Virginia Supreme Court's Order in the case below amounts to ordering the Jefferson County government to follow the law and the Ordinance procedures that 1) the Jefferson County Commission adopted and that, 2) under the former Ordinance, the procedures the Planning Commission was supposed to have implemented had the correct procedure been followed from the beginning.

It was the County Commission, through its agency, the Planning Commission, who failed to apply the proper procedures to Far Away Farm. The West Virginia Supreme Court merely implemented the procedures that the County should have applied all along. To do less would have violated Far Away Farm's due process rights. To implement the proper procedures does not violate Dunleavy's due process rights, since his due process rights (if any) are defined by the former ordinance, and the former ordinance states that the Planning Commission issue the CUP because Far Away Farm has met the substantive criterion of the ordinance.

D. Federal Case Law Encourages Federal Courts To Give Deference To State Court's Interpretations Of Local Land Use Decisions

Federal land use policy favors leaving matters of local land use law to the states, since the states have the sometimes unenviable task of shaping land use policy. This principle has been succinctly stated by the United States Court of Appeals for the Fourth Circuit. Although the cited case arises under the 42 U.S.C. § 1983 rubric, it nonetheless details a strong policy rationale for allowing states to develop state law:

> Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention into what "has always been an intensely local area of the law." Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif.L.Rev. 839, 839 (1983). "Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors" that are inherent in municipal land-use decisions. *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). Further, allowing "every allegedly arbitrary denial by a town or city of a local license or permit" to be challenged under § 1983 would "swell[ ] our already overburdened federal court system beyond capacity." *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir.

> 1985). Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every "'run of the mill dispute between a developer and a town planning agency.'" *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) (quoting *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982)). In most instances, therefore, decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately-and intimately-affected.

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 67 -68 (C.A.4 (Md.) 1992).

This is especially true in the state of West Virginia, which, except for a few counties and some municipalities, by and large do not have zoning ordinances. The decisions of the West Virginia Supreme Court regarding zoning are therefore very relevant and important as guidance to the state as it shapes and enacts zoning laws in areas that have never implemented a zoning ordinance. This Court should not disturb that process.

IV. CONCLUSION

Far Away Farm qualifies for the CUP under the Ordinance, and the West Virginia Supreme Court, recognizing that fact, ordered the CUP to issue pursuant to its certiorari review. The facts

that were developed in the hearings below will remain unchanged even if new hearings are ordered, consequently, new hearings would be a senseless exercise. The West Virginia Supreme Court is allowed to review those facts and their jurisdictional application on appeal due to the certiorari procedure. This Court should not disturb that decision now.

Consequently, this Court should deny the Petition for Writ of Certiorari filed herein.

Respectfully submitted,
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